

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

MATT HOSSEINZADEH,

*Plaintiffs,*

– against –

ETHAN KLEIN and HILA KLEIN,

*Defendants.*

**Civ. Action No.: 16-cv-3081 (KBF)  
ECF Case**

**PLAINTIFF'S LOCAL RULE 56.1  
STATEMENT OF UNDISPUTED MATERIAL FACTS**

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**I. THE PARTIES AND THIS ACTION**

1. Plaintiff Matt Hosseinzadeh (“**Plaintiff**”) is a recognized filmmaker, having a cult following, with original film productions on the popular YouTube.com (“**YouTube**”) channel “MattHossZone,” some of which productions have view counts exceeding 10 million views. (Hosseinzadeh Decl. ¶ 4; Ex. 2, Infringing Video at 3:44 – 5:02.)

2. Defendants Ethan Klein (“**Mr. Klein**”) and Hila Klein (“**Ms. Klein**”) (collectively the “**Kleins**” or the “**Defendants**”) post video content to their YouTube channels having the names “Ethan and Hila” (accessible at <https://www.youtube.com/user/h2h2productions>) and “H3H3 Productions” (accessible at <https://www.youtube.com/user/h3h3productions>). (Ex. 6, Klein Dep. at 32:5-23, Dec. 29, 2016.)

3. Plaintiff is the sole owner of the copyright and all other rights in and to the creative motion picture collection of works titled “The Bold Guy & Horny Tony Volume 1” (US Copyright Reg. No. PAu 3-770-968), which collection includes the individual work titled “Bold Guy 12 Parkour Girl” (individually the “**Work**”). (Hosseinzadeh Decl. ¶ 7; Ex. 1, Copyright Registration Certificate.)

4. As an independent filmmaker struggling to achieve mainstream recognition, Plaintiff invests virtually all of his personal income into his projects—hiring actors, leasing equipment, as well as functioning in multiple roles as writer, director, producer, cinematographer, actor, editor, and even stunt man for his projects. (Hosseinzadeh Decl. ¶ 8.)

5. Plaintiff also composes all of the original soundtrack works for his film projects which music works have also received independent recognition. (Hosseinzadeh Decl. ¶ 9.)

6. Plaintiff’s “The Bold Guy & Horny Tony Volume 1” collection, including the Work, was created as a collection of comedic works, meant to highlight and satirize modern day

courting rituals by featuring an implausible hero, the “Bold Guy,” who seduces women in equally implausible, awkward, and entertaining scenarios such as via a dance competition, a Parkour running competition, chatting with a vampire, battling with a demon, among others. (Hosseinzadeh Decl. ¶ 10.)

7. On February 15, 2016, Defendants posted a video on the Ethan and Hila YouTube channel that copied and displayed segments comprising 3:18 minutes of Plaintiff’s 5:24 minute Work (the “**Infringing Video**”). (Ex. 2, Infringing Video; Dkt. 54, Def. Mem. L at p. 8.)

8. The Infringing Video was created and publicly displayed without license from Plaintiff. (Hosseinzadeh Decl. ¶ 12.)

9. On April 2, 2016, Plaintiff emailed the Defendants to request that they immediately remove the Infringing Video from YouTube and cease all future infringement of the Work. (Hosseinzadeh Decl. ¶ 13; Ex. 4.)

10. On April 2, 2016, Mr. Klein on behalf of the Defendants responded to Plaintiff via email, refusing to cease their infringement, claiming fair use exemption, directing Plaintiff to contact their attorney, and daring Plaintiff to file a takedown request with YouTube pursuant to the Digital Millennium Copyright Act (“**DMCA**”), stating that the Defendants would dispute such takedown notice and that the “[Infringing Video] will be reinstated within two weeks” because the Defendants have “dealt with this many times,” and such allegations of infringement were evidently a “matter of routine to [them].” (Hosseinzadeh Decl. ¶ 14; Ex. 4.)

11. On April 23, 2016, Plaintiff submitted to YouTube a notification, pursuant to 17 USC § 512(c)(3) (the “**DMCA**”), requesting that YouTube take down the Infringing Video. (Hosseinzadeh Decl. ¶ 15.)

12. On April 26, 2016, the Defendants submitted to YouTube a counter notification,

pursuant to 17 USC § 512(g)(3), affirming under penalty of perjury that the Infringing Video was improperly removed because it was, among other reasons, a fair use and “noncommercial.” (Hosseinzadeh Decl. ¶ 16; Ex. 5, Defendants’ Counter-Notification.)

13. Plaintiff then filed this action against Defendants, claiming copyright infringement of his Work, on April 26, 2016. (Dkt. 1.)

14. The Defendants’ Answer to the Plaintiff’s claim, as amended, asserts in relevant part the affirmative defense of fair use. (Dkt. 27.)

## **II. FAIR USE FACTOR 1: TRANSFORMATIVE USE**

### **a. Characteristics of the Infringing Video**

15. The Infringing Video copied and displayed 3:18 minutes of Plaintiff’s 5:24 minute Work. (Ex. 3, Infringing Video; Dkt. 54, Def. Mem. L. at p. 8.)

16. The copied segments of Plaintiff’s Work in the Infringing Video sequentially follow the order of their appearance in the original Work. (Ex. 2 compared to Ex. 3.)

17. A transcription of the entirety of the Infringing Video, timestamped for illustrative purposes, follows (Ex. 2, Full Infringing Video):

18. **0:00 - 1:15**: (Defendants introduce themselves and talk about Plaintiff as the king of “CringeTube.”). **1:16 - 1:23**: Seven second excerpt of original Work title screen. **1:24 - 1:43**: *Ethan*: I like the fucking text is like a, does like a wave dance prolongs the shit out of that. You see that? Even now and it’s done? *Hila*: Oh, yea. *Ethan*: Like this (waves hands). *Hila*: (laughs). *Ethan*: Can I get a little bit from you Hila? *Hila*: (mutters unintelligibly as she waves her arms). *Ethan*: Oh c’mon! Get your shit together, Hila. (Ex. 7.)

19. **1:43 - 1:48**: Five second excerpt of Bold Guy meeting Athletic Girl while she is stretching. **1:49 - 2:07**: *Ethan*: Oh, my god. *Hila*: (mutters unintelligibly). *Ethan*: This is like Prank Invasion. *Hila*: Yea. *Ethan*: One point oh. That’s just you know, doing, spreading my asshole on the street like you do. *Hila*: Just on the street. *Ethan*: This is like some real nature shit. This is like presenting yourself. *Hila*: Yea. *Ethan*: In the most classical sense. (Ex. 8.)

20. **2:07 - 2:17**: Ten second excerpt of Bold Guy talking to Athletic Girl about her form. She asks if he is a creep. **2:18 - 3:31**: *Ethan*: I don’t know lady, you’re spreading

open your asshole on the sidewalk, I'm not sure you're in a position to be calling people creeps. **Hila:** Yea... What I love about his videos is that he setup that situation. **Ethan:** Yea the blame really is on Matt. **Hila:** This is... this is his script. **Ethan:** Yea, you're right. **Hila:** So, if you look at it from his point of view, this is just a girl doing this stuff on the street. **Ethan:** You're right. I'm placing the blame entirely in the wrong place. It goes back to the famous saying, "We see the world not as it is but as we are." Okay, now a little more wisdom from uncle Ethan here, but basically grandpa Ethan here, but basically this is how Matt Hoss sees the world, it says more about him. Let's enter the mind of Matt Hoss. Matt, look at him, I love his face right now. Just gotta love Matt. **Hila:** (Unintelligible). **Ethan:** Yea gotta show those (unintelligible) off. C'mon. Guy walks around like this you know he's bold and... he's probably beautiful. **Hila:** It's sleeveless shirt with the hoodie. **Ethan:** The sleeveless with the hoodie is probably one of the classiest pieces of clothing you can own. It's like I do want to protect my head, but at the same time, you know it might be so cool I want to protect my head, but at the same time (raises sleeves) c'mon. My arms need to breathe. It's such a classy clothing. **Hila:** It's a really great combo. (Ex. 9.)

21. **3:31 - 3:43:** Twelve second excerpt of Bold Guy exchange with Athletic Girl regarding her attention-seeking. **3:44 - 5:02:** **Ethan:** You know when you watch a porn you endure this shit because you know it's going somewhere but here it's like there's no payoff. **Hila:** It's just the crappy... **Ethan:** It's the crappy pornage. **Hila:** Story. **Ethan:** It's like, what is the point of this? And the thing that always baffled me about Bold Guy, before we get too deep into this (shows YouTube view numbers), ho-ho, what! Nine million views? **Hila:** What! **Ethan:** But look at the, like, ratio, people are... **Hila:** When did he get so many... ten million views. **Ethan:** Well this is from 2013. This is CringeTube. This is from the CringeTube era like I said. Damn. But like I said, people liked it. Like, people genuinely were on board with Matt Hoss. And I'm not saying the guy deserves hate, I think he's doing his own thing and I respect that. But it's just, I find it interesting that so many people saw the world as he does. **Hila:** Yea. **Ethan:** I guess that's what I mean. Uh. That's shocking. That shocks me. **Hila:** Ten million views? The subscribers are low. **Ethan:** Yea you think that, he would have, well that's from CringeTube. People before just, I mean, I don't know how many people got their dicks out and just probably moved on. **Hila:** Flowing with the cringe. **Ethan:** This was before PrankInvasion so this was like the first generation of JerkTube. Of jerky little ding-dong on YouTube. (Ex. 10.)

22. **5:02 - 5:18:** Sixteen second excerpt continued exchange between Athletic Girl and Bold Guy. **5:19 - 5:42:** **Ethan:** I love how he always, he writes their lines always to set him up. **Hila:** Yea. **Ethan:** Zinger. **Hila:** Yea. **Ethan:** It's pretty funny. **Hila:** He always just... the female character is always so annoying. And he writes them like that. **Ethan:** Super offensive, super slutty, super bitchy, but then ultimately they give into his sexual prowess. **Hila:** Because how can you not? **Ethan:** How could you not? He's Matt Hoss, get a load of that face. **5:43 - 5:54:** Eleven second excerpt of Bold Guy and Athletic Girl flirting. **5:55 - 6:03:** **Ethan:** Oh, wow. Wow. **Hila:** What kind of (unintelligible) is that? **Ethan:** It's one that says porn is imminent. But it's not. **6:04 - 6:06:** Two second excerpt of Bold Guy and Athletic Girl continuing to flirt. **6:07 - 6:15:** **Ethan:** He wrote that in by the way. **Hila:** What are these situations? **Ethan:** Just remember that remember whenever I comp anything like that, he wrote that in. He wrote, "She said Strong shoulders." **Hila:** Yea. **6:16 - 6:32:** Sixteen second excerpt of Bold Guy and Athletic Girl

continuing to flirt. **6:33 - 6:48: Ethan:** Holy fuck. **Hila:** Of course. **Ethan:** And it's just that easy, baby, get out there and get some girls yourselves guys. **Hila:** Sleeveless shirt with a hoodie. **Ethan:** That's the key. Bracelets are out. **Hila:** Yea. **Ethan:** Sleeveless hoodies in. **Hila:** In. **Ethan:** In, in, in, in. (Ex. 11.)

23. **6:48 - 6:59:** Eleven second excerpt wherein Athletic Girl propositions Bold Guy to catch her and she will let him do whatever he wants to her. **7:00 - 7:27: Ethan:** Oh, is that a fucking promise? Because I can think of some foul shit. I always found that phrase funny too. It's like, what are you going to do to her? You going to have sex with her? And then what? Like what weird shit do you have in mind? Are you going to put a carrot up her ass? I mean where does this go? You going to shit in her mouth? Put a carrot by her you know what I mean? It's like, tsk, how far are we taking this? (Ex. 12.)

24. **7:27 - 7:39:** Twelve second excerpt wherein Bold Guy accepts the challenge. Plaintiff's original music starts. **7:40 - 8:12: Ethan:** Yea, he thinks he's like a parkour guy. **Hila:** Oh yea. **Ethan:** He thinks he's like a parkour expert, he's got that whole, that whole level of greatness. Dude, Matt Hoss is... I want Matt Hoss to have a show. This shit is so fucking entertaining, like legit. He kind of fell off recently, but I want him on TV, I really do. This shit is so entertaining. **Hila:** It's funny. **Ethan:** Porn, titties, ass, and the x-factor of parkour. **Hila:** I completely forgot about him, he's so funny. **Ethan:** He's great. He's such a great character. (Ex. 13.)

25. **8:12 - 8:20:** Eight second excerpt parkour action sequence while original music plays. **8:21 - 8:36:** (original music continues to play over commentary, digitally fed into the Infringing Video rather than as background music on the Defendants' computer) **Hila:** He could have just taken the stairs. **Ethan:** I was going to say, is he required to do that? He could have just gone around. **Ethan:** The stairs were there. **Ethan:** Look, can you imagine the casting call for this? Looking for cute, petite, parkour girl to star in my parkour sex video. **8:37 - 9:02:** Twenty-five second excerpt of continued parkour action with original music. **Ethan** (speaking over video): Get her Matt, she wants your dick, you can do anything you want to her. Just imagine putting that carrot up her ass dude. Visualize the carrot in her ass man. You gonna put, you gonna put some mayonnaise in her fucking mouth. Mayonnaise mouth fetish. **9:03 - 9:12: Ethan:** God, he scaled that wall with so much grace. It's got me thinking about Matt, so much shoulder, you know what I'm saying, so much grace. (Ex. 14.)

26. **9:12 - 9:19:** Seven second excerpt of continued parkour action with original music. **9:19 - 10:00: Ethan:** What happens when she, when he catches her? Does he have to like tackle her? **Hila:** He does whatever he wants. **Ethan:** No, does he like take her out and then rape her? Is that what she's saying? **Hila:** Yea, whatever he wants. **Ethan:** Hope he's got mayonnaise and carrots with him. Cause that's what I want. That's what I've always wanted. Carrots in the ass, mayonnaise in the mouth. **Hila:** What's with the mayonnaise? **Ethan:** I don't know, she said whatever I want. Well why are you more confused about the mayonnaise but not the carrot in the ass? I don't know why you chose that one. **Hila:** Cause... **Ethan:** Well the carrot goes in the ass but the man, well maybe, I mean, I just like mayonnaise. **Hila:** You can just eat mayonnaise. **Ethan:** That's basically what I'm suggesting. (Ex. 15.)

27. **10:00 - 10:09**: Nine second excerpt of continued parkour action with original music. **10:09 - 10:11**: *Ethan*: There's a fuck... this, there's a sidewalk next to you. **10:11 - 10:14**: Three second excerpt of continued parkour action with Ethan talking over it. *Ethan*: Why did he jump that wall? **10:14 - 10:17**: *Ethan*: ...and stuff. You dang goubus. (Ex. 16.)

28. **10:17 - 10:23**: Six second excerpt of continued parkour action with original music. **10:23 - 10:39**: *Ethan*: So this was the action sequence. I guess. ***This was the meat of the video*** (emphasis added). *Hila*: It's pretty long. *Ethan*: It's action-packed. It's got it all. Sex, action, mayonnaise. *Hila*: Drama. *Ethan*: Carrots. (Ex. 17.)

29. **10:39 - 10:47**: Eight second excerpt of continued parkour action with original music. **10:47 - 11:02**: *Ethan*: That was sick. *Hila*: Nah. *Ethan*: That was some straight-up parkour. *Hila*: It's supposed to look effortless. *Ethan*: What, that didn't look effortless? That was fucking parkour dude. (Ex. 18.)

30. **11:02 - 11:09**: Seven second excerpt of continued parkour with original music until Bold Guy catches girl. **11:09 - 11:19**: *Ethan*: Woah. I'm gonna like this video. That was badass. *Hila*: Yea. *Ethan*: He's going to fuck the shit out of her now, man. (Ex. 19.)

31. **11:19 - 11:22**: Three second excerpt of Athletic Girl unable to escape from Bold Guy who magically appears at every corner. **11:22 - 11:41**: *Ethan*: You know what? I got a problem with this now because I was on-board, this was real video, and now they kind of broke that realism and my dick deflated. Cause I was rock hard. Cause I was thinking I could do this. But now I know it's fake. *Hila*: Yea. *Ethan*: Disappointing. *Hila*: That's a shame. *Ethan*: Disappointing. **11:41 - 11:49**: Eight second excerpt of Work, dialogue between Bold Guy and Athletic Girl. **11:49 - 12:07**: *Ethan*: And then he pulls out a jar of mayonnaise, and ah, this is for saying I could do anything I want to you. *Hila*: I didn't know you like mayonnaise so much. *Ethan*: It's pretty good. I really like mayonnaise. I love mayonnaise. It's valentine's day Hila, what you got for me? (Ex. 20.)

32. **12:07 - 12:25**: Eighteen second excerpt of Work, dialogue between Bold Guy and Athletic Girl. Rolling credits from Work. **12:25 - 13:47 (End)**: *Ethan*: So, I mean that was like a, that was actually a romp. That was a romp and a riot. *Hila*: What's a romp? *Ethan*: It's a riot. A romp is a goof, plus a spoof, plus a gaff, plus a riot. You never heard romp? *Hila*: No I never heard that word. *Ethan*: Well I'm just introducing it now, it's a new word. It's a new, it's like saffron is to soup. It spices the whole dish up. That was a total romp. That was a lot of fun. So, that is the Matt Hoss Zone. Look, it's a sexy place, it's a wild place, it's a mayonnaisey place, and it's a romp. Most of all it's a mayonnaise romp. Maybe I should kind of let them mayonnaise romp. But there is plenty more, so I recommend going to Matt Hoss, checking him out, he's... look... say what you will but the guy puts a lot of effort into his videos, he clearly plans them, he's very professional, I mean the guy cares about what he does. So, you know, we goof on him but he deserves some respect, you know. (Ex. 21.)

**b. The Infringing Video is Primarily Entertainment Rather than Commentary**

33. Defendants claim that the Infringing Video is a work of commentary and criticism. (Ex. 6, Klein Dep. at 172:24-173:14, Dec. 29, 2016; Dkt. 54, Def. Mem. L. at p. 8.)

34. Mr. Klein makes the final editorial decisions for all of the Defendants' videos. (Klein Dep. at 140:24 - 142:4, Dec. 29, 2016.)

35. Mr. Klein has no formal education in critiquing film. (Ex. 6, Klein Dep. at 21:16-24, Dec. 29, 2016.)

36. The Defendants' H3H3 Productions channel was initially created to feature works of "comedy" specifically "videos intended to make [their] audience laugh." (Ex. 6, Klein Dep. at 24:23 – 25:20, Dec. 29, 2016.)

37. The Defendants would use the videos of other people in a critical manner in order to serve the purpose of comedy. (Ex. 6, Klein Dep. at 29:11 – 30:2.)

38. As of Dec. 29, 2016, it is and has always been the purpose of the H3H3 Productions channel to showcase comedy videos. (Ex. 6, Klein Dep. at 49:18-25.)

39. As of Dec. 29, 2016, it is and has always been the purpose of the Ethan and Hila channel to showcase comedy videos. (Ex. 6, Klein Dep. at 50:1-12.)

40. Mr. Klein considers himself to be a comedian and comic personality. (Ex. 6, Klein Dep. at 50:18-22.)

41. Mr. Klein does not consider himself to be a literary critic or a film critic. (Ex. 6, Klein Dep. 50:23 – 51:1.)

42. Defendants explain the substance of their critique and commentary with respect to each of the foregoing-transcribed sections of the Infringing Video in the Klein Dep., Dec. 29, 2016, the relevant pages of which are exhibited and fully incorporated by reference herein. (Ex. 6, Klein Dep. at 217:10 – 275:18, Dec. 29, 2016.)

43. The Defendants summarize the thesis of their commentary with respect to the Infringing Video as that “[Plaintiff] portrays himself as this cool, suave, pick-up, athletic, you know, sex machine. But he’s actually a buffoon, a misogynist, and [...] the perception he sees as himself is completely backwards [...] pseudo pornography misogyny.” (Ex. 6, Klein Dep. at 276:21 – 277:10, Dec. 29, 2016.)

44. Defendants admit that “pretty much every scene” in the original Work “has this cringe-y pseudo pornographic message” and that the Defendants excerpted all of the scenes of the Work that they excerpted in order to point out this “misogyny” and its “historical context.” (Ex. 6, Klein Dep. at 278:5 – 279:13, Dec. 29, 2016.)

45. Defendants admit that “every excerpt that [they] used pretty much stands for the same idea” with respect to misogyny. (Ex. 6, Klein Dep. at 279:9-13, Dec. 29, 2016.)

46. With respect to the segment of the Work used in 0:00-1:43 of the Infringing Video (Ex. 7), Defendants claim they meant to setup up the Infringing Video as a historical reference point to what they refer to as “cringe-tube.” (Ex. 6, Klein Dep. at 217:15 – 218:6, Dec. 29, 2016.)

47. With respect to the segment of the Work used in 1:43-2:07 of the Infringing Video (Ex. 8), Defendants claim they meant to liken the Work to a third-party PrankInvasion series of videos “because it taps into the same pornographic market [...] where [Plaintiff’s] suave character come[s] swoop in and get that – get that ass, as they say.” (Ex. 6, Klein Dep. at 221:18-222:18, Dec. 29, 2016.)

48. With respect to the segment of the Work used in 2:07-3:31 of the Infringing Video (Ex. 9), Defendants claim they meant to comment, **again**, on the idea that “[Plaintiff] has [...] spun this fantasy world, where he’s [...] this alpha male that comes and gets women as he pleases,” that “it’s really just misogynistic pseudo pornography,” and that “bold guy, who was an alter ego of

[Plaintiff], is trying to depict himself as cool and suave.” (Ex. 6, Klein Dep. at 225:6 – 233:22, Dec. 29, 2016.)

49. With respect to the segment of the Work used in 3:31-5:02 of the Infringing Video (Ex. 10), Defendants claim they meant to comment, again, on the historical significance of “cringe-tube” and that Plaintiff is making “misogynistic pseudo pornography.” (Ex. 6, Klein Dep. at 233:25 – 235:24, Dec. 29, 2016.)

50. Defendants made the same comment with respect to the segment of the Work used in 2:07-3:31 of the Infringing Video as they had with respect to the segment of the Work used in 3:31-5:02 of the Infringing Video. (Ex. 6, Klein Dep. at 235:9-24, Dec. 29, 2016.)

51. With respect to the segment of the Work used in 5:02-6:48 of the Infringing Video (Ex. 11), Defendants claim they meant to convey the same point as in previous segments--that the Work is “really just misogynistic pseudo pornography.” (Ex. 6, Klein Dep. at 236:1-25, Dec. 29, 2016.)

52. With respect to the segment of the Work used in 6:48-7:27 of the Infringing Video (Ex. 12), Defendants claim they meant to convey the same point as in previous segments. (Ex. 6, Klein Dep. at 237:1-24, Dec. 29, 2016.)

53. Defendants’ discussion of “the carrot and the mayonnaise” and “shit in her mouth” in 5:02-6:48 of the Infringing Video (Ex. 11), was meant, the Defendants claim, again, to convey the misogyny of the Work. (Ex. 6, Klein Dep. at 238:15 – 239:13, Dec. 29, 2016.)

54. The original Work did not have any mention of “the carrot and the mayonnaise” or “shit in her mouth.” (Ex. 6, Klein Dep. at 239:3-13, Dec. 29, 2016.)

55. Defendants represent that their discussion of “the carrot and the mayonnaise” and “shit in her mouth” brings new expression to the Work. (Ex. 6, Klein Dep. at 239:6-13, Dec. 29,

2016.)

56. Defendants also represent that their discussion of “carrots in the mouth” was meant to be comedic and entertaining and, while it is meant to highlight, again, the misogyny of the Work, it does not add to the misogyny of the Work. (Ex. 6, Klein Dep. at 240:18 – 241:19, Dec. 29, 2016.)

57. With respect to the segment of the Work used in 7:27-8:12 of the Infringing Video (Ex. 13), Defendants claim they meant to convey the single point that Defendants appreciated the entertainment value of the action sequence in that segment. (Ex. 6, Klein Dep. at 241:21 – 242:19, Dec. 29, 2016.)

58. With respect to the segment of the Work used in 8:12-9:12 of the Infringing Video (Ex. 14), Defendants claim they meant to convey that the parkour action sequence is silly or absurd. (Ex. 6, Klein Dep. at 242:21 – 245:19, Dec. 29, 2016.)

59. With respect to the segment of the Work used in 9:12-10:00 of the Infringing Video (Ex. 15), Defendants claim they meant to convey, again, that the parkour action sequence is silly or absurd, and to build, again, “upon this whole thesis of the misogynistic pseudo pornography.” (Ex. 6, Klein Dep. at 258:4 – 249:24, Dec. 29, 2016.)

60. With respect to the segment of the Work used in 10:00-10:17 of the Infringing Video (Ex. 16), Defendants narrated the action in the segment and claim they meant to point out, again, that the parkour action sequence is silly or absurd. (Ex. 6, Klein Dep. at 260:22 – 261:15, Dec. 29, 2016.)

61. With respect to the segment of the Work used in 10:17-10:39 of the Infringing Video (Ex. 17), Defendants represent that the *tone* of Ms. Klein’s voice meant to express “the drawn out action between the two characters.” (Ex. 6, Klein Dep. at 264:18 – 265:13, Dec. 29,

2016.)

62. With respect to the segment of the Work used in 10:39-11:02 of the Infringing Video (Ex. 18), in that segment spoken commentary by the Defendants was limited to Mr. Klein saying, “That was sick,” Ms. Klein replying, “Nah,” Mr. Klein replying, “That was some sick parkour,” Ms. Klein replying, “It’s supposed to look effortless,” and Mr. Klein concluding, “What? Didn’t it look effortless? That was fucking parkour, dude.” Defendants represent that this exchange was meant to convey, again, the “misogynistic pornograph[y]” of the Work--despite Defendants not saying anything about “misogynistic pornograph[y]” in that segment. (Ex. 6, Klein Dep. at 266:3 – 268:4, Dec. 29, 2016.)

63. With respect to the segment of the Work used in 11:02-11:19 of the Infringing Video (Ex. 19), in that segment spoken commentary by the Defendants was limited to Mr. Klein saying, “Well, I’m going to like this video, that was bad ass,” Ms. Klein replying, “Yeah,” and Mr. Klein concluding, “He’s going to fuck the shit out of her now, man.” Defendants represent that this exchange was meant to convey, again, the “pseudo pornography” and “misogynistic” nature of the Work. (Ex. 6, Klein Dep. at 269:2 – 270:1, Dec. 29, 2016.)

64. Defendants admit that the point they meant to convey with respect to the segment of the Work used in 11:02-11:19 of the Infringing Video had already been made by Defendants several times in the Infringing Video but that this specific clip adds more action from the Work to that commentary. (Ex. 6, Klein Dep. at 270:2-21, Dec. 29, 2016.)

65. With respect to the segment of the Work used in 11:19-12:07 of the Infringing Video (Ex. 20), Defendants narrated the teleportation action in the segment and discussed, again, what at deposition Mr. Klein called “this wonderful metaphor of [the carrots and] mayonnaise” which “is [again] a metaphor for this absurd, you know, misogynistic pseudo pornography.” (Ex.

6, Klein Dep. at 271:7 – 272:15, Dec. 29, 2016.)

66. With respect to the segment of the Work used in 12:07-13:47 of the Infringing Video (Ex. 21), Defendants claim to have used this segment to convey that the entire Work is a “romp and a riot.” (Ex. 6, Klein Dep. at 274:8 – 275:12, Dec. 29, 2016.)

**c. Defendants Treat the Scripted Work Differently than the Supposedly Unscripted PrankInvasion Video to which it is Compared**

67. When asked about whether the Defendants’ thesis is that Plaintiff’s Work stands for “absurd, old style, cringe-tube misogyny,” Mr. Klein seems to have trouble differentiating between the Plaintiff as filmmaker of the Work and Plaintiff as the “Bold Guy” scripted character he plays in the Work. (Ex. 6, Klein Dep. at 276:3-20, Dec. 29, 2016.)

68. At another point at his deposition, Mr. Klein compares Plaintiff’s Work to an unrelated third-party’s “PrankInvasion” video in that “they’re carving out kind of similar space on YouTube, of this misogynistic pseudo pornography.” (Ex. 6, Klein Dep. at 221:8 – 223:2, Dec. 29, 2016.)

69. With respect to the PrankInvasion video as compared to Plaintiff’s Work, it is clear to Mr. Klein that one video (the PrankInvasion video) “is trying to look like it’s real life” and that the other video (the Plaintiff’s Work) is scripted and “is pretty clear that it’s not real life.” (Ex. 6, Klein Dep. at 222:20 – 223:2, Dec. 29, 2016.)

70. In the PrankInvasion videos, titled “PrankInvasion – Family Edition” and “PrankInvasion – No Clothes Family Day,” (together the “PrankInvasion Videos”) the host films himself approaching random women and seducing them into kissing him in front of their family members. (Ex. 24, Reaction to PrankInvasion Videos.)

71. In the Defendants’ “reaction” to the PrankInvasion Videos, Defendants (i) highlighted the creepiness of the hosts voice by editing it with voice modulation; (ii) highlight

absurdity by inserting an image of an old lady falling down stairs; (iii) highlight the pornographic nature of the videos by inserting a short clip from a pornography video; (iv) highlight voyeuristic aspects of the video by editing zoom onto the faces of people in the video; (v) highlight creepiness of the action by inserting the picture of an internet meme known as “Harold;” (vi) highlight a father’s fury over watching his daughter kissed by editing the video to a red tint; and (vii) highlight the pornographic experience of the video by inserting an image of Neil DeGrasse Tyson over a woman’s exposed private area. (Ex. 24, Defendants’ Reaction to Prank Invasion Videos; Ex. 6, Klein Dep. at 185:11 – 198:9, 203:1 – 205:6.)

72. In the Infringing Video, the Defendants did not make a single stylistic alteration to Plaintiff’s Work as they did to the PrankInvasion Videos. (Ex. 6, Klein Dep. at 279:14 – 281:1, Dec. 29, 2016.)

**d. Defendants Understood that Stylistic Alterations Contribute to the Transformative Nature of a Use**

73. In contrast to the Infringing Video, Defendants made significant stylistic alterations to other videos that they have used for their “reaction videos.” (Ex. 25, Who Are The Fine Brothers; Ex. 26, Marshal Pope Video.)

74. Defendants’ discussion of their transformative use of the Marshal Pope Video is instructive of their understanding of transformative use. (Ex. 6, Klein Dep. at 178:21 – 181:3, Dec. 29, 2016.)

75. Defendants understood that stylistic alterations “contributed to the fair use aspect” of their PrankInvasion reaction video. (Ex. 6, Klein Dep. at 204:24 – 205:6.)

**III. FAIR USE FACTOR 2: NATURE OF THE COPYRIGHTED WORK**

76. Defendants admit that the Plaintiff’s Work is a creative, scripted work. (Ex. 6, Klein Dep. at 222:20 – 223:2, Dec. 29, 2016.)

**IV. FAIR USE FACTOR 3: AMOUNT OF THE ORIGINAL WORK USED**

77. The Infringing Video copied and displayed 3:18 minutes of Plaintiff's 5:24 minute Work. (Ex. 3, Infringing Video; Dkt. 54, Def. Mem. L. at p. 8.)

78. The copied segments of Plaintiff's Work in the Infringing Video follow sequentially the order of their appearance in the original Work. (Ex. 2.)

79. By contrast, in videos that they created prior to the Infringing Video, the Defendants were "careful to only use so much of the original videos as was necessary for [their] commentary." (Ex. 6, Klein Dep. at 141:10 – 142:4, Dec. 29, 2016.)

**V. FAIR USE FACTOR 4: EFFECT ON MARKET FOR PLAINTIFF'S WORK**

80. Plaintiff is diligent about enforcing his copyrights in his creative works. (Hosseinzadeh Decl. ¶ 18.)

81. Plaintiff had written numerous cease and desist requests and DMCA take-down requests with respect to his creative work in the past, and such requests, excepting the instant matter, have always been honored. (Hosseinzadeh Decl. ¶ 19; Ex. 23.)

82. Plaintiff derives an income from his creative works, including the Work, in the form of advertising that YouTube airs with his work. (Hosseinzadeh Decl. ¶ 20.)

83. Plaintiff also derives income from his work, including the Work, in the form of revenues he receives from sales of the various songs that are included in the original soundtracks to his works. (Hosseinzadeh Decl. ¶ 21.)

84. Plaintiff's ability to monetize the Work on YouTube is directly correlated to the number of "views" that his Work receives from YouTube users viewing the Work on Plaintiff's YouTube Channel. (Hosseinzadeh Decl. ¶ 22.)

85. When a YouTube user watches nearly the entirety of the Plaintiff's Work on one

YouTube channel, such as the Defendants' channel, such a user is unlikely to then re-watch the same Work on Plaintiff's YouTube channel. (Hosseinzadeh Decl. ¶ 23.)

86. As a filmmaker and composer of the original music in the soundtrack to his Work, Plaintiff stands to make additional licensing revenues from third-parties who would wish to license his Work or elements of his Work for their own projects. (Hosseinzadeh Decl. ¶ 24.)

87. In fact, Plaintiff had in several instances received requests to either license the advertising space to his work (outside of YouTube advertising) and to license the use of the original music in his work. (Hosseinzadeh Decl. ¶ 25; Ex. 22.)

88. Defendants have had similar licensing offers for their own work and are have been and are in fact members of a "YouTube Network" that serves as an agency for YouTube, bringing Defendants brand deals and advertising deal opportunities. (Ex. 6, Klein Dep. at 120:14 – 121:12, Dec. 29, 2016; Ex. 27, Email Between Mr. Klein and Omnia Network.)

## **VI. DEFENDANTS' INFRINGEMENT WAS WILLFUL**

### **a. Defendants Knew and Exercised Substantially More Editorial Care to Make Their Other Videos**

89. Prior to this lawsuit, based on their own research, Defendants had an understanding of "transformative use" as "in its essence, to change the meaning, the expression of the video that's being criticized." (Ex. 6, Klein Dep. at 139:20 – 140:17, Dec. 26, 2016.)

90. Whenever Defendants uploaded a video, they had a policy of analyzing its content and deciding, based on their own research, that it was a fair use of whatever third-party content they used within. (Ex. 6, Klein Dep. at 141:10-15.)

91. While editing their videos, Defendants were "mindful to basically cut out as much of the [third-party video content] as possible, and to make sure that [Defendants] were commenting or critiquing every – every segment that came before. So it was part one, reducing the amount of

the [third-party video content]. And part two, making sure that there was transformative use of it.” (Ex. 6, Klein Dep. at 141:16-24, Dec. 26, 2016.)

92. Defendants were careful to only use so much of the third-party video content as was necessary for their commentary. (Ex. 6, Klein Dep. at 141:25 – 142:4, Dec. 26, 2016.)

93. Defendants’ editorial care with respect to the economy of original third-party content used and the editorial thoughtfulness of adding stylistic alterations as a way to highlight the substance of their commentary is readily apparent in examples of their other videos such as “Who Are The Fine Brothers” video, their “Marshal Pope” video, and their “Reaction to PrankInvasion Videos.” (Ex. 6, Klein Dep. at 178:21 – 181:3, Dec. 29, 2016; Ex. 25, Who Are The Fine Brothers; Ex. 26, Marshal Pope Video; Ex. 24, Reaction to PrankInvasion Videos.)

**b. Defendants Did Not Bother to Exercise Editorial Thoughtfulness with Plaintiff’s Work Because They Deemed Plaintiff an Insignificant Threat**

94. The number of subscribers a YouTube channel has determines the number of YouTube users who will become immediately aware of any new video posted on the channel. (Hosseinzadeh Decl. ¶ 26.)

95. YouTube channel subscribers are more likely than a non-subscribing YouTube user to visit and view a channel’s newly-posted video. (Hosseinzadeh Decl. ¶ 27.)

96. The number of video views is one major factor in deciding the monetization value of a YouTube video in that (i) each view generates some advertising income to a video that utilizes YouTube advertising; and (ii) each full view of a video adds to the probability that YouTube’s proprietary video promotion algorithm will promote that video to non-subscribing users as a video worth watching. (Hosseinzadeh Decl. ¶ 28.)

97. Thus, the more channel subscribers a YouTube channel has, the more views its new videos will receive, and the more non-subscriber focused promotion that channel will receive, and

in the end the channel will accumulate even more subscribers, more views, and more advertising revenue. (Hosseinzadeh Decl. ¶ 29.)

98. The number of subscribers a YouTube channel has is also an indicator of the number of loyal fans that the channel creators have. (Hosseinzadeh Decl. ¶ 30.)

99. For example, after the Defendants, following the commencement of this lawsuit, posted their video “We Are Being Sued” in which they denigrated the Plaintiff for suing them, countless YouTube users, likely Defendants’ fans and subscribers, proceeded to post negative comments about Plaintiff and his videos throughout Plaintiff’s and Defendants’ channels, sent Plaintiff threats and other hate-mail, contributed negative comments and reviews to Plaintiff’s online videos and music sales pages. (Hosseinzadeh Decl. ¶ 31; Ex. 28, Screenshots of Negative Comments.)

100. Between their two channels, “H3H3 Productions” and “Ethan and Hila,” the Defendants have in excess of 4 million subscribers. (Ex. 6, Klein Dep. at 94:18-23, Dec. 29, 2016.)

101. The Defendants acknowledge the importance of subscribers, checking their numbers on a regular basis as part of their “job.” (Ex. 6, Klein Dep. at 95:4-12, Dec. 29, 2016.)

102. At one point, the Defendants were issued a DMCA take-down of one of their other videos by third-party content network FullScreen. (Ex. 29, Censorship On YouTube video.)

103. It was the Defendants’ opinion that FullScreen was attempting to censor them from criticizing FullScreen’s partners—specifically PrankInvasion. (Ex. 6, Klein Dep. at 151:10-25, Dec. 29, 2016.)

104. It was the Defendants’ opinion that the reaction video they posted, that was taken-down by FullScreen, was a fair use. (Ex. 6, Klein Dep. at 158:20-23, Dec. 29, 2016.)

105. After the Defendants posted their “Censorship On YouTube” video in reaction to

the FullScreen takedown, there arose a YouTube community controversy around this event. (Ex. 6, Klein Dep. at 161:14-22, Dec. 29, 2016.)

106. Defendants admit that the YouTube community controversy arose as a result of their video, “Censorship on YouTube.” (Ex. 6, Klein Dep. at 162:1-11.)

107. Following the YouTube community controversy, which arose as a result of the “Censorship on YouTube” video, FullScreen reinstated the Defendants’ video and FullScreen’s CEO personally made a statement that the takedown of the Defendants’ video was in error. (Ex. 6, Klein Dep. at 162:25 – 164:2, Dec. 29, 2016.)

108. When Plaintiff initially reached out to the Defendants’ to ask them to remove the Infringing Video, Defendants replied that they “will disputed (sic) it and the video will be reinstated within two weeks. We’ve dealt with this many times, it is a matter of routine for us.” (Ex. 4.)

109. After Plaintiff ultimately sued the Defendants over the Infringing Video, the Defendants published the “We Are Being Sued” video. (Ex. 6, Klein Dep. at 281:2-14, Dec. 29, 2016.)

110. The publication of the “We Are Being Sued” videos resulted in a major YouTube controversy, even generating news coverage in mainstream media. (Hosseinzadeh Decl. ¶ 32; Ex. 30, *Variety*, *Perez Hilton*, *Inquisitr*, *TechDirt*, and *Forbes* articles.)

111. The YouTube channel PrankInvasion (<https://www.youtube.com/user/PrankInvasion>) has over 2.5 million subscribers. (Hosseinzadeh Decl. ¶ 33.)

112. Plaintiff’s channel MattHossZone (<https://www.youtube.com/user/MattHossZone>) has just over 170,000 subscribers. (Hosseinzadeh Decl. ¶ 34.)

Dated: New York, New York  
February 13, 2017

THOMPSON BUKHER LLP

By:

A handwritten signature in dark ink, appearing to be 'TB' followed by a stylized flourish.

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